Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1262

KEVIN FLOWERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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KEVIN FLOWERS,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Kevin Flowers respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit rendered the 15th day of January 1979, affirming the judgment of the United States District Court for the Southern District of New York (Lasker, D.J.), convicting the defendant of possession of a firearm without a license therefore (26 U.S.C. §§5845, 5861(D) and 5871).

OPINION BELOW

The United States Court of Appeals for the Second Circuit did not write a formal opinion, but rather, rendered a memorandum decision, which is annexed as an appendix to this petition, along with the order of affirmance.

JURISDICTION

The jurisdiction of this Court is predicated upon 28 U.S.C. §1254(i) and the Rules of the Supreme Court, Rule 22(2). The order of affirmance is dated January 15, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments of the United States Constitution, as well as 26 U.S.C. §§5845, 5861(D) and 5871, are involved herein.

QUESTIONS PRESENTED

1. Whether an accused who already has counsel representing him on a state charge, may be summarily taken into custody by federal agents on similar grounds, surreptitiously whisked out of the state court, and then questioned in the absence of his counsel concerning the very facts that caused his state arrest?

2. Whether a statement taken in the enforced absence of an accused's counsel may be used against him on the pretext that the questioning was in connection with a federal crime based upon the identical facts as his state arrest, and whether such statement may then be used against the accused as the main basis of his conviction in a federal trial?

3. Whether or not a *per se* rule should be adopted by this Court prohibiting the taking of a statement from an accused who has a lawyer representing him, unless such lawyer, after consulting with the accused, consents to his client giving a voluntary statement?

THE FACTUAL BACKGROUND

The petitioner herein was arrested by state authorities and charged with possession of a sawed-off shotgun in Bronx County, New York. He was in his early twenties, and had custody of a young child, born out of wedlock. His mother is employed by the IRS and two uncles are medical doctors and police officers respectively. The defendant himself, however, a male person of black ancestry, was not well-educated, and was not adjusting well to society.

About ten days after his arrest in Bronx County, the defendant came to court, *i.e.*, the state court, with his mother. He already had a lawyer representing him at that time.

Unknown to either his mother or the court, and probably unknown to his lawyer (since the lawyer was never called as a witness), two federal agents summarily arrested the defendant in the back of the courtroom where the prisoners are held, and whisked him away to the U.S. Courthouse in the lower part of Manhattan. During this interval, while he was being transported downtown from the Bronx, an incriminatory statement was obtained from the defendant-petitioner. This statement was deemed crucial to his later conviction on the federal charge, since the trial judge in this non-jury trial, indicated that the confession to the federal authorities was a major factor.

Flowers took the stand and stated that he had been coerced into making the statement and that he had asked for a lawyer. Moreover, he denied that his state lawyer ever gave him any

advice whatsoever about talking to the federal authorities and, consequently, this testimony was refuted only by one of the agents who alleged that he had spoken to the state lawyer, who indicated that he would not be representing Flowers in any federal case. This lawyer did not testify and, therefore, we only have a hearsay assertion from the mouth of an agent, as to what was said.

REASONS FOR GRANTING THE WRIT

I.

Since Flowers, a young black lad of limited education, was not given the benefit of advice from his retained state lawyer prior to federal agents seizing him in the prisoner area of the state court and whisking him downtown, the statement which petitioner gave to these officers should have been suppressed in all respects.

In the case at bar, Flowers already had a lawyer representing him in a state action charging him with possession of a sawed-off shotgun. On his second or third appearance in state court, while accompanied by his mother and his attorney, Flowers appeared on the state charge before the Criminal Court, Bronx County.

Flowers, while being held in the prisoner area of the courthouse, was suddenly arrested by two federal agents, who whisked him out of the building without the knowledge of his mother and, according to Flowers, without the knowledge of his lawyer, and took him downtown to the federal court.

The petitioner was questioned, however, in the enforced absence of his lawyer on the way down, and an important incriminating statement was obtained from him, which later proved to be his undoing at his trial.

Had this been a state matter, the statement would have been summarily suppressed (*People v. Hobson*, 39 N.Y. 2d 477, 384 N.Y.S. 2d 418).

We maintain that *Miranda v. Arizona*, 384 U.S. 436, implies a need for a similar *per se* rule in federal courts. *See Spano v. New York*, 360 U.S. 315 and *Massiah v. United States*, 377 U.S. 201.

In view of the foregoing, we submit that the statement obtained without counsel from this young black lad, should have been suppressed and that this Court, on constitutional basis, and in the exercise of its supervisory power over federal courts, should require suppression of any statements obtained in this manner.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

ORDER OF AFFIRMANCE AND MEMORANDUM DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of January, one thousand nine hundred and seventy-nine.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge

HONORABLE J. JOSEPH SMITH
Circuit Judge

HONORABLE INZER B. WYATT,
District Circuit Judge, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

KEVIN FLOWERS,

Defendant-Appellant.

78-1291

Appeal from the United States District Court for the Southern District of New York.

Order

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. Judge Lasker's finding that Flowers was not represented by counsel in connection with the federal gun charge at the time he was taken into custody is not clearly erroneous, and must be upheld. *See United States v. Boston,* 508 F.2d 1171, 1175 (2d Cir. 1974), *cert. denied,* 421 U.S. 1001 (1975). Accordingly, Flowers's confession was not obtained in the absence of counsel, and was properly admitted into evidence.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

s/ J. Joseph Smith
J. JOSEPH SMITH,
Circuit Judge

s/ Inzer B. Wyatt
INZER B. WYATT,
District Judge, sitting
by designation.